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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 680

CLAYTON L. KASTEN AND DOROTHY KASTEN,
Petitioners,

vs.

UNITED STATES OF AMERICA, EDWARD G. MINOR, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF WISCONSIN, AND EMIL B. NELSON, IN HIS CAPACITY AS DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CHRIST ALEXOPOULOS,
3327 North 48th Street,
Milwaukee, Wisconsin,
Attorney for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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CLAYTON L. KASTEN AND DOROTHY KASTEN,
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UNITED STATES OF AMERICA, EDWARD G. MINOR, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF WISCONSIN, AND EMIL B. NELSON, IN HIS CAPACITY AS DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Clayton L. Kasten and Dorothy Kasten, your petitioners, pray that Writs of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled cause on the 16th day of November, 1962.

OPINIONS BELOW.

The Court of Appeals. The opinions of the Court of Appeals in this case (Appendix A, B, *infra*, pp. 9, 11) have not yet been reported.

The District Court. The order for judgment of the District Court granting respondents' motion to dismiss in the above entitled action is set forth in Appendix C (*infra*, pp. 13-14); it was not reported.*

JURISDICTION.

The judgment of the Court of Appeals was entered on the 16th day of November, 1962. It is printed in the Appendix (Appendix A) hereto, *infra*, pp. 9-10. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1), Appendix J, *infra*, p. 26.

QUESTIONS PRESENTED.

I.

Does the *Di Bella* case (March 1962) render moot petitioner Clayton Kasten's complaint (filed Sept. 1960) when the District Judge had denied petitioner's temporary injunction prior to petitioner's indictment?

II.

Does the *Di Bella* case render moot the complaint of petitioner Dorothy Kasten which complaint seeks the return of property belonging to her and in no way tied to a criminal prosecution *in esse* against her, when she has been deprived of her property in violation of her rights under the Fourth and Fifth Amendments of the United States Constitution?

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* The unprinted record consists of a record and transcript on first appeal; a supplemental record on second appeal.

RULE INVOLVED AND CONSTITUTIONAL PROVISIONS INVOLVED.

The rule in the *Di Bella* v. *United States*, 369 U. S. 121, is herein involved.

The constitutional provisions involved are set forth in Appendix D, *infra*, p. 15.

THE COMPLAINT.

The verified complaint herein alleged (Record pp. 7-15) that petitioners' records were obtained from them by fraud, deceit, trickery, and device—an illegal search and seizure in violation of petitioners' constitutional rights under the Fourth and Fifth Amendments of the Constitution of the United States (Appendix D, *infra*, p. 15); that the Court had jurisdiction over the parties and subject matter *28 USC Section 2463* (Appendix J, *infra*, p. 26); that a special agent fraudulently and deceitfully managed to get possession of petitioners' books and records by representing his investigative purposes to be civil and routine in nature where in truth he was conducting a criminal investigation of petitioners; that by virtue of the artifice, stealth, deception, etc., so employed, the books and records were involuntarily made available by petitioner Clayton Kasten (without the consent of Dorothy Kasten); that the special agent made false representations known by him to be false; that petitioner Clayton Kasten relied on the false representations and was in such manner induced to part with the books and records only for civil audit; that the books and records are petitioners' book and records; that the complaint required a return of all such books and records and copies or transcripts made therefor; that a jury demand was made to hear the issues therein.

STATEMENT OF CASE.

In October 1957 a criminal investigation was commenced against petitioners under color of the Internal Revenue laws (Appendix F, *infra*, p. 17). During this time petitioners' books and records were illegally obtained, copies made and retained (Record, pp. 7-15). Petitioner, Dorothy Kasten, never authorized or knew of this transaction until subsequently.

In September 1960 petitioners filed their complaint seeking injunction-suppression and return of their records. Petitioner, Dorothy Kasten, had signed the tax returns also signed by her husband. She had worked on the business records. She was co-owner of the building where the records were kept and the business conducted.

On December 5, 1960 the District Court heard and denied the Government's motion labeled Summary Judgment (Appendix G, *infra* (p. 18).

On December 30, 1960 the District Court permitted only one of seven of petitioners' witnesses subpoenaed to testify on petitioners' motion for temporary injunction. The court denied the motion and denied a request for a stay (30 Dec. 1960 transcript, p. 148).

On January 3, 1961 the petitioners appealed from a denial of the motion for temporary injunction.

On January 4, 1961 the petitioner, Clayton Kasten, was indicted. The appeal was dismissed by the Circuit Court of Appeals on February 15, 1961 (Appendix B, *infra*, pp. 11-12).

Petitioners have never been granted a hearing in the District Court going to the merits of their complaint.

On September 26, 1962 a hearing was had on the Government's motion to dismiss petitioners' complaint alleging the same to be moot. Under the ruling of *Di Bella* v. *United*

States, 369, U. S. 121, the motion was granted (p. 11, supp. record).

On October 25, 1962 the petitioners appealed from the order of December 30, 1960 and from the judgment of dismissal dated September 27, 1962 (p. 23 of supp. record).

On November 16, 1962 petitioners' appeal was dismissed (Appendix A, *infra*, pp. 9-10). A subsequent motion for stay of mandate addressed to the Circuit Court of Appeals was made and granted.

This Petition for Writ of Certiorari is made within the time allowed by such stay.

REASONS FOR THE GRANTING OF THE WRIT.

I.

The case as it stood before the District Judge prior to dismissal raised no interlocutory problems. The District Court had jurisdiction over the parties and the subject matter, and had in fact denied the Government's motion for Summary Judgment (Appendix G, *infra*, p. 18). The records sought by petitioner, Dorothy Kasfen, were neither contraband, the fruit of a crime, nor instruments of a crime. Petitioner, Dorothy Kasten, has yet to be charged with any crime (Appendix E, *infra*, p. 16). Her complaint raised issues properly before the District Court and not tied to any criminal proceeding directed against her. Under *28 USC Sec. 2463* petitioner, Dorothy Kasten, may not replevy her records, illegally taken from her under color of the Internal Revenue Laws, and such records are deemed to be in the custody of the law and subject only to the orders and decrees of the Courts of the United States having jurisdiction thereof (Appendix J, *infra*, p. 26).

II.

Certiorari must be granted to correct the erroneous decision of the Court below.

III.

This case was properly before the Circuit Court of Appeals on appeal from the judgment of the District Court dismissing the complaint of petitioners, *28 USC 1254*, paragraph 1 (Appendix J, *infra*, p. 26).

IV.

To deny certiorari to the petitioner, Dorothy Kasten, is tantamount to forcing her to involuntarily testify against her husband in the criminal case for which he is indicted, all made possible if her records and information taken therefrom and copied are not returned to her. In effect this is permitting her to be unconstitutionally deprived of her property and her property to be used without her consent in an attempt to send her husband to jail, in violation of her rights under the Fourth and Fifth Amendments to the Constitution of the United States (Appendix D, *infra*, p. 15).

V.

Certiorari should be granted to insure that petitioner Dorothy Kasten's records may not be used against her if the Government can devise a mode or method of prosecuting her subsequent hereto in violation of her rights not to be compelled to be a witness against herself in a criminal case (Appendix D, *infra*, p. 15).

VI.

To deny petitioner, Dorothy Kasten, certiorari herein is to deny her her day in court. Prior to the Government's motion to dismiss the complaint under the *Di Bella* case, the District Judge determined that petitioner, Dorothy Kasten, was entitled to her day in court (Appendix G, *infra*, p. 18).

VII.

To deny petitioner, Dorothy Kasten, certiorari herein, paves the way for depriving her of her property without due process of law in the eventually forthcoming civil liability case which will ultimately be brought against her and her husband Clayton Kasten. This would be in violation of her rights under the Fifth Amendment to the Constitution of the United States (Appendix D, *infra*, p. 15).

VIII.

Petitioner Dorothy Kasten is entitled to a jury trial of the issues raised in her complaint. Any other hypothetical or conceivably alternate method by which she may seek return of her property could only result in a denial of her right of trial by jury. This would be in violation of her rights guaranteed under the Seventh and Tenth Amendment to the Constitution of the United States and as guaranteed under Article I, Declaration of Rights, Section V of the Wisconsin Constitution (Appendix D, *infra*, p. 15).

CONCLUSION.

For the reasons stated, and under the authorities cited, it is submitted that the decision of the Court of Appeals for the Seventh Circuit was and is in error, and that this Petition for a Writ of Certiorari to that Court to review its action in so holding, as herein sought, is well founded in fact and in law and should be granted.

Respectfully submitted,

CHRIST ALEXOPOULOS,
3327 North 48th Street,
Milwaukee, Wisconsin,
Attorney for Petitioners.

APPENDIX A.

Last Opinion Below.

UNITED STATES BIAED OF APPEALS
For the Seventh Circuit.

Friday, November 16, 1962.

Before

Hon. John S. Hastings, Chief Judge,
Hon. Win G. Knoch, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge.

Clayton L. Kasten and Dorothy Kasten,
Plaintiffs-Appellants,

No. 13990 vs.

United States of America, Edward G. Minor, United States Attorney for the Eastern District of Wisconsin, and Emil B. Nelson, in his capacity as District Director of Internal Revenue,
Defendants-Appellees.

} Second appeal from the United States District Court for the Eastern District of Wisconsin.

This matter comes before the Court on the motion of defendants-appellees for dismissal and for docketing and filing the record in this appeal; and the answer of plaintiffs-appellants to said motion.

On consideration of the motion of counsel for defendants-appellees and the answer thereto, and the record on appeal

certified to this Court from the United States District Court for the Eastern District of Wisconsin,

IT IS HEREBY ORDERED and adjudged by this Court that this cause be docketed in this Court and that this appeal from an order of the United States District Court for the Eastern District of Wisconsin, entered therein on September 27, 1962, be, and the same is hereby DISMISSED.

APPENDIX B.

First Opinion Below.

UNITED STATES BOARD OF APPEALS

For the Seventh Circuit.

February 15, 1961.

Before

Hon. John S. Hastings, Chief Judge,
Hon. F. Ryan Duffy, Circuit Judge,
Hon. Latham Castle, Circuit Judge.

Clayton L. Kasten and Dorothy Kasten,
Plaintiffs-Appellants.

No. 13242 vs.

United States of America, Edward G. Minor, United States Attorney for the Eastern District of Wisconsin, and Emil B. Nelson, in his capacity as District Director of Internal Revenue,
Defendants-Appellees.

First appeal from the United States District Court for the Eastern District of Wisconsin.

The instant cause was filed in the United States District Court for the Eastern District of Wisconsin, and was there designated as No. 60-C-168. The relief sought by the complaint was a temporary restraining order, a temporary injunction and a permanent injunction restraining the defendants from presenting evidence to the United States

Grand Jury in the Eastern District of Wisconsin, which evidence plaintiffs claimed had been obtained from them illegally. The complaint also asked all such evidence be suppressed and returned to plaintiffs. The United States moved to dismiss the motion. The Court treated the motion as one for summary judgment. The Court denied the motion for a summary judgment. Thereafter, it entered an order denying the motion for a temporary injunction from which order plaintiffs appealed to this Court.

It Further Appearing that the plaintiffs-appellants did not apply to the District Court or to this Court for a stay pending this appeal; and, it appearing further that on January 4, 1961, the Grand Jury returned an indictment against plaintiff Clayton L. Kasten for wilful attempted evasion of income taxes for the years 1954, 1955 and 1956, said action being designated in the records of the District Court for the Eastern District of Wisconsin as No. 61-CR-1, United States of America *vs.* Clayton L. Kasten; and, it further appearing that evidence concerning the alleged income tax offenses of plaintiff, Clayton L. Kasten, including evidence obtained in the course of the investigation by the United States Treasury Department, as described in the complaint herein, has been presented to the Grand Jury, and that no criminal proceeding is pending or contemplated against plaintiff-appellant, Dorothy Kasten, and defendants-appellees having moved to dismiss the instant appeal as moot;

It Is Ordered, the appeal herein be and the same is hereby Dismissed.

APPENDIX C.

UNITED STATES DISTRICT COURT.

Eastern District of Wisconsin.

Clayton L. Kasten and Dorothy Kasten, *Plaintiffs*, vs. United States of America, Edward G. Minor, United States Attorney for the Eastern District of Wisconsin, and Emil B. Nelson, in his capacity as District Director of Internal Revenue, *Defendants*.	Civil No. 60-C-168. District Court's Order Dismissing Complaint.

ORDER FOR JUDGMENT.

The above-entitled matter having come on for hearing before the Court on September 26, 1962 on defendants' motion to dismiss, and Christ Alexopoulos, attorney for the plaintiffs being present in Court, and appearing for the plaintiffs, and the defendant United States of America being represented by Philip L. Padden, an Assistant United States Attorney for the Eastern District of Wisconsin, and the Court having heard the complete oral arguments of the respective attorneys, and being fully advised in the premises, and being of the opinion that the above-entitled action and the issues raised by the action are moot,

as there is an adequate remedy at law to Clayton L. Kasten in the criminal proceeding, Case No. 61-CR-1, *United States of America* v. *Clayton Louis Kasten*, and that further there is no criminal proceeding pending or contemplated against *Dorothy Kasten;* now, therefore, upon all of the records, files, and proceedings had herein,

IT IS HEREBY ORDERED as follows:

1. That the above-entitled action be dismissed.

2. The Clerk of Courts is directed to enter final judgment in accordance with the foregoing provisions of this Order.

Dated at Milwaukee, Wisconsin, this 26th day of September, 1962.

ROBERT E. TEHAN,
United States District Judge.

APPENDIX D.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution of the United States Provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

The Fifth Amendment to the Constitution of the United States Provides:

> "* * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *."

The Seventh Amendment to the Constitution of the United States Provides:

> "* * * the right of trial by jury shall be preserved, * * *."

The Tenth Amendment to the Constitution of the United States Provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Article I, Declaration of Rights, Section V of the Wisconsin Constitution Provides:

> "The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy, * * *."

APPENDIX E.

TRANSCRIPT OF PROCEEDINGS UPON DEFENDANTS' MOTION TO DISMISS.

Before Honorable Robert E. Tehan.

December 5, 1960.

Record—Page 32.

Mr. Equitz: * * * Just one moment. I will speak to the Special Agent, who is present in the courtroom.

If the Court please, the Government is prepared to state for the record at this time that no presentment of any criminal tax case involving the wife to the Grand Jury is contemplated at all; and that only the husband—only the plaintiff, Clayton L. Kasten, is concerned in the case of the Government criminal tax investigation.

APPENDIX F.

TRANSCRIPT OF PROCEEDINGS UPON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION.

Before Honorable Robert E. Tehan.

December 30, 1960.

Pages 9 and 10.

Mr. Equitz: * * * With regard to the facts, the Government at this time will offer to and does concede and admit the following facts with a view to shortening the proof at this hearing.

The jurisdiction of the Intelligence Division of the Internal Revenue Service, among other things, includes the investigation of alleged criminal violations arising under the Internal Revenue Laws, including willful attempted income tax evasion, and including and excluding other particular violations not here pertinent.

In mid-October, 1957, Special Agent Kermit A. Duehring, named in the complaint of the Intelligence Division, the Milwaukee office of the Internal Revenue Service, was assigned to an investigation concerning the plaintiffs.

On November 5, 1957, Revenue Agent Harold Dolato of the Audit Division, Milwaukee Office of the Internal Revenue Service, for the first time joined this investigation for the purpose of assisting it, and from this time thereafter and at all times mentioned in the complaint the investigation was a joint investigation.

This investigation was criminal in the sense that it was intended to determine whether any criminal offense arising under the Internal Revenue laws had been committed by the plaintiffs.

APPENDIX G.

Record—pp. 81-82.

The Court: * * * I am going to address myself to the proceedings here.

We have here a complaint, which is somewhat lengthy. We have a motion, which we will call a Motion for Summary Judgment, supported by an affidavit; and then we have an Answering Affidavit.

I think that expresses what the pleadings to be considered here are.

Now, then, it is the Government's position that this be treated something in the nature of a—best described as in the nature of demurrer where the Government says to the court, take the most favorable view of the well pleaded facts, and we say there that it does not spell out a claim nor does it give rise to such facts that could develop on trial that could spell out a claim.

I find myself very reluctant, and it has been borne on me of the experience in the reception I have had on summary judgment by the Appellate Court in the 7th Circuit, *and one of their fundamentals is that if there is any question whatsoever or any issue of fact that the court should allow the parties a day in court* (Emphasis supplied).

It is for that reason that I am going to at this time deny the motion denominated as a Motion to Dismiss, but also to be interpreted as a Motion for Summary Judgment.

APPENDIX H.

UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

Clayton L. Kasten and Dorothy Kasten, *Plaintiffs-Appellants*, vs. United States of America, Edward G. Minor, United States Attorney for the Eastern District of Wisconsin, and Emil B. Nelson, in his capacity as District Director of Internal Revenue, *Defendants-Appellees.*	Cause No. 13990.

MOTION FOR DISMISSAL AND FOR DOCKETING AND FILING THE RECORD IN THIS APPEAL.

The defendants-appellees move the Court to dismiss the appeal herein and deny a stay in criminal proceeding No. 61-CR-1, United States *vs.* Clayton L. Kasten, for the reason the ruling of the District Court for the Eastern District of Wisconsin was interlocutory, and therefore this Court has no jurisdiction within the meaning of the principles

established in *Di Bella* v. *United States*, 369 U. S. 121 (1962), and as fully appears from the affidavit attached hereto.

James B. Brennan,
United States Attorney,
By (s) Philip L. Padden,
Assistant United States Attorney,
Attorneys for Defendants-Appellees,
358 Federal Building,
Milwaukee 1, Wisconsin.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit.

Clayton L. Kasten and Dorothy Kasten, *Plaintiffs-Appellants*, vs. United States of America, Edward G. Minor, United States Attorney, for the Eastern District of Wisconsin; and Emil B. Nelson, in his capacity as District Director of Internal Revenue, *Defendants-Appellees*.	Cause No.

AFFIDAVIT IN SUPPORT OF MOTION FOR DISMISSAL AND FOR DOCKETING AND FILING THE RECORD IN THIS APPEAL.

STATE OF WISCONSIN, } ss.
MILWAUKEE COUNTY, }

PHILIP L. PADDEN, being first duly sworn on oath, deposes and says as follows:

That he is an Assistant United States Attorney in and for the Eastern District of Wisconsin; and is one of the attorneys for the defendants-appellees;

That he has personally examined the United States District Court records and files in the instant action, Civil No. 60-C-168, United States District Court, Eastern District of Wisconsin, as well as pending criminal Action No. 61-CR-

1, United States of America *vs.* Clayton L. Kasten, United States District Court, Eastern District of Wisconsin;

That the defendant in the said criminal action is one of the plaintiffs-appellants in the instant appeal, namely Clayton L. Kasten;

That, to the knowledge of this affiant, no criminal proceeding against or prosecution of the plaintiff-appellant Dorothy Kasten, is now pending or being considered, nor has any been considered at any time.

That, it is apparent that the instant appeal is governed by the decision of *Di Bella* v. *United States*, 369 U. S. 121 (1962) and that consequently the District Court's ruling is non-appealable.

(s) PHILIP L. PADDEN.

Subscribed and sworn to before me this 6th day of November, 1962.

(s) WILLIAM J. MULLIGAN,
Notary Public, Milwaukee County, Wis.

My Commission is permanent.

APPENDIX I.

UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

Clayton L. Kasten and Dorothy Kasten, *Plaintiffs-Appellants*, vs. United States of America, Edward G. Minor, United States Attorney for the Eastern District of Wisconsin, and Emil B. Nelson, in his capacity as District Director of Internal Revenue, *Defendants-Appellees.*	Case No. 13990.

ANSWER TO MOTION TO DOCKET AND DISMISS.

STATE OF WISCONSIN, } ss.
MILWAUKEE COUNTY. }

CHRIST ALEXOPOULOS, being first duly sworn on oath, deposes and says as follows:

That he is the attorney for the above named plaintiffs-appellants; that the instant cause was filed in the United States District Court for the Eastern District of Wisconsin and designated 60-C-168; that the relief sought by the complaint was a temporary restraining order, a temporary injunction, and a permanent injunction restraining the de-

fendants from presenting evidence to the United States Grand Jury or thereafter using said evidence in any manner or in any court, which evidence plaintiffs claim was obtained from them illegally. The complaint also asked all such evidence be suppressed and to be returned to plaintiffs. The United States moved to dismiss the motion. The Court treated the motion as one for summary judgment. The Court denied the motion for summary judgment. After permitting plaintiffs to present evidence from only one witness, six other witnesses having been subpoenaed but not given time or permission to testify, the Court entered an order denying the motion for a temporary injunction. The Court also denied a stay of all proceedings for the purpose of an appeal from said order of denial of a temporary injunction. An indictment was returned charging Clayton Kasten with tax evasion. The Court's order was appealed to this Court. A motion to docket and Dismiss was made by the United States Attorney. The Appeal was dismissed. Two years after the original complaint seeking injunctive relief was filed by plaintiffs, the same was dismissed upon motion of the United States Attorney. This is an appeal from the order denying plaintiffs' motion for temporary injunction and from the order dismissing plaintiffs' complaint on the merits without hearing the merits of said cause.

That the complaint of Dorothy Kasten is one for injunction-suppression and solely for the return of property in no way tied to a criminal prosecution in esse against her, and that her rights under the Fourth and Fifth Amendment of the U. S. Constitution have been violated.

That the complaint of Clayton Kasten is also one for injunction-suppression, but that, as your affiant is informed and verily believes, that the order of the District Court denying plaintiffs' motion for a temporary injunction was made prior to complaint, or a detention or release on bail

following arrest, and prior to an arraignment or indictment.

That your affiant believes that plaintiffs' rights to justice have been violated in that justice has been delayed.

(s) CHRIST ALEXOPOULOS.

Subscribed and Sworn to Before Me This 15th Day of November, 1962.

(s) EDNA M. KNUEPPEL,
Notary Public, Milwaukee County, Wisconsin.

My Comm. expires Dec. 29, 1963.

APPENDIX J.

Statutes and Rules.

28 U. S. C. 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *

28 U. S. C. 2463. Property taken under revenue law not repleviable.

All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

Office-Supreme Court, U.S.
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No. 680

In the Supreme Court of the United States

October Term, 1962

CLAYTON I. KARTEN AND DOROTHY KARTEN,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 680

CLAYTON L. KASTEN AND DOROTHY KASTEN, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals rendered no opinion. The orders of the court of appeals (Pet. 9–12) and district court (Pet. 13–14) have not been reported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1962. The petition for a writ of certiorari was filed on December 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly dismissed an appeal by petitioner Clayton L. Kasten from an order dismissing an action to suppress evidence on the

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ground that, an indictment having been returned against him, the order was not appealable.

2. Whether the court of appeals erred in dismissing the appeal by petitioner Dorothy Kasten, a joint plaintiff in the same action, in view of the fact that neither the complaint nor the supporting affidavits showed any violation of her rights.

STATEMENT

On September 21, 1960, petitioners, husband and wife, filed a complaint (R. 7–16)[1] in the United States District Court for the Eastern District of Wisconsin, alleging that Internal Revenue agents had obtained certain books and records from petitioner Clayton L. Kasten by false representations made to him. The complaint requested an injunction against the use of the evidence so obtained in any criminal proceeding, and that all copies and transcripts of such records be returned. The government moved to dismiss (R. 18) and filed an affidavit (R. 19–23) in which the Special Agent in charge of the investigation of petitioner denied the alleged deceit, and stated that all the original records had been returned to Clayton Kasten.[2] The complaint and Clayton Kasten's affidavit refer to the records as his (R. 10, 24–25). In her affidavit, Dorothy Kasten stated that, "as she is informed," the records were obtained from her husband (R. 26).

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[1] "R." refers to the typewritten record on the first appeal. "Supp. R." refers to the typewritten record on the second appeal.

[2] In their affidavits (R. 24–26), petitioners do not controvert the fact that the original documents were returned.

On January 3, 1961, on the basis of the affidavits and the testimony of the Special Agent,[2] the district court denied the requested preliminary injunction, finding that no irreparable injury would result and that there was no "likelihood" that petitioners would ultimately prevail on the merits (R. 115–117).

Petitioners appealed on January 3, 1961 (R. 118). On the following day an indictment for attempted tax evasion was returned against Clayton Kasten (Pet. 4, 12). The court of appeals dismissed the appeal (Pet. 11–12) on the basis of an affidavit filed by the government stating that the indictment had already been returned, and that no criminal proceedings against Dorothy Kasten were or ever had been contemplated.[4]

Subsequently, the district court, after hearing argument, dismissed petitioners' action on September 26, 1962, observing that Clayton Kasten had an adequate remedy in the criminal proceeding and that no criminal proceeding was pending or contemplated against Mrs. Kasten (Pet. 13–14; Supp. R. 19–20). Petitioners again appealed, and the court of appeals dismissed the appeal on November 16, 1962 (Pet. 9–10).[5]

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[2] See the separate transcript (150 pages) of the proceedings on December 30, 1960.

[4] Affidavit of Howard C. Equitz, Assistant United States Attorney, dated February 2, 1961.

[5] The government had filed an affidavit signed by Philip L. Padden, Assistant United States Attorney, dated November 6, 1962, stating *inter alia* that the criminal action against Clayton Kasten was still pending, and that no criminal proceeding against Dorothy Kasten "is now pending or being considered, nor has any been considered at any time" (Pet. 21–22).

ARGUMENT

1. The court of appeals was clearly correct in dismissing the appeal by Clayton Kasten, since he was already under indictment when the district court dismissed the action, and the district court's order of dismissal was therefore not a final, appealable order. "Orders granting or denying suppression in the wake of such proceedings [presentation before a United States Commissioner or a grand jury] are truly interlocutory, for the criminal trial is then fairly in train." *DiBella* v. *United States*, 369 U.S. 121, 131.

2. As to petitioner Dorothy Kasten, the complaint and supporting affidavits stated no facts which could have entitled her to the relief requested. In her affidavit, she did not allege that any representations were made to her, that the records were hers, or that the records were obtained from her. On the contrary, she admitted that the records were obtained from her husband. Therefore, while Mrs. Kasten claims that she did not "authorize" her husband to waive her constitutional rights (R. 26), no facts have been alleged even suggesting that any rights of hers were violated.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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